(1)

91-1831

No. _____

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.* and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS FOSTER
MARTIN S. KAUFMAN*
*COUNSEL OF RECORD
ATLANTIC LEGAL FOUNDATION
205 East 42nd Street
New York, NY 10017
(212) 573-1960

Attorneys for Petitioners

74

QUESTIONS PRESENTED

1. Is the First Amendment to the United States Constitution violated by the State University of New York compelling students to pay a mandatory student activity fee to support a group which engages in significant political and ideological speech and activities with which some students disagree?

2. Is the First Amendment violation resulting from compelling students to pay student activity fees which are used to finance the political and ideological speech of others cured by limiting the use of those fees to finance political and ideological speech on campus?

PARTIES TO THE PROCEEDING

The Petitioners, Appellants below, are: Thomas W. Carroll, Robert J. Carroll, Michael E. McChesney, Emanuel J. Panos, Edward J. Priola, Craig J. Rucker, Robert T. Schmidlin, Beth Turkovic Garfunkel, Christine McClellan, Christopher Sandor and Susanne Ziegler.

The Respondents, Appellees below, are Donald M. Blinken, in his capacity as Chairman of the Board of Trustees of the State University of New York, George L. Collins, Jr., D. Clinton Dominick, Judith Lasker Duken, Arnold B. Gardner, Gurstin D. Goldin, John L.S. Holloman, Jr., Nan Johnson, Everette Joseph, Judith Davidson Moyers, Edward V. Mele, Victor Marrero, Rosemary Salomone, Edgar A. Sandman, Thomas van Arsdale, Darwin R. Wales, in their capacities as Trustees of the State University of New York, Jerome Komisar, in his capacity as Acting Chancellor of the State University of New York, Vincent O'Leary, Clifford D. Clark, Alice Chandler, in his or her capacity as president and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, and the New York Public Interest Research Group, Inc.[1]

---

[1] All of the respondents, except the New York Public Interest Research Group, Inc., were sued in their official capacity. During the course of this case, many of them ceased holding the official positions they held when sued. Pursuant to Fed.R.Civ.P. 25(d), their successors were deemed to have been automatically substituted as defendants.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES CITED v

DECISIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 14

I. This Case Involves Important Issues of Law That Should be Resolved By This Court and is in Conflict With Important Decisions of this Court 14

II. The Decision of the Court of Appeals is in Conflict With the Decision of the Court of Appeals for Another Circuit 27

CONCLUSION 30

Page

APPENDICES

Appendix A - Opinion of the United States Court of Appeals for the Second Circuit, dated February 13, 1992 . . . . . 1 A

Appendix B - Constitutional Provisions at Issue . . . . . 1 B

Appendix C - The State University of New York Student Fee Regulation . . . . . 1 C

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 14, 15, 16, 17, 18 19

Associated Press v. United States, 326 U.S. 1 (1945) 25

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 16, 19

Board of Education v. Pico, 457 U.S. 853 (1982) 22

Buckley v. Valeo, 424 U.S. 1 (1979) 19, 25

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 15, 16, 17, 27

Communications Workers v. Beck, 487 U.S. 735 (1988) . . . 15

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984) 15, 17

Elrod v. Burns, 427 U.S. 347 (1976) 18

Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) 24, 26 27, 28, 29

Healy v. James, 408 U.S. 169 (1972) 22, 25

Keller v. State Bar of California, 496 U.S. 1 (1990) 14, 15, 17, 18, 19, 25, 27

Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589 (1967) 21

TABLE OF AUTHORITIES - Continued

Page

Cases

Kusper v. Pontikes, 414 U.S. 51 (1973) 18

Lehnert v. Ferris Faculty Association, 500 U.S. ___, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991) 15, 17

New York Times v. Sullivan, 376 U.S. 254 (1964) 25

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 21, 22

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) 21

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 16, 18

Schad v. Mount Ephraim, 452 U.S. 61 (1968) 17, 21

Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990) 19

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 21

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 22

United States v. Albertini, 472 U.S. 675 (1985) 21

United States v. O'Brien, 391 U.S. 367 (1968) 21

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 21

Widmar v. Vincent, 454 U.S. 263 (1981) 20, 25

TABLE OF AUTHORITIES - Continued

Page

Cases

Wooley v. Maynard, 430 U.S. 705 (1977) 20

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 2201 3

29 U.S.C. § 2202 3

42 U.S.C. § 1983 3

42 U.S.C. § 1985(3) 3

Regulations

8 New York Consolidated Rules
and Regulations (N.Y.C.R.R.) § 302.14 . . . . . 3, 5

Miscellaneous

New York Public Interest Research Group,
Board of Directors Manual 10, 12

No. _____

In The

Supreme Court Of The United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, ***et al.*** and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported at 957 F.2d 991 (2d Cir. 1992) The decision is reproduced in Appendix A. Page references are to the Appendix. The decision of the United States District Court for the Southern District of New York is reported at 768 F.Supp. 1030 (S.D.N.Y. 1991).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit, review of which is sought in this petition, was entered February 13, 1992, and was filed the same day. No petition for rehearing was filed. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The full text of these constitutional provisions is set out at Appendix B. Also at issue is the student activity fee regulation of the State University of New York, contained in volume 8 of the New York Consolidated Rules and Regulations ("N.Y.C.R.R."), §302.14, the full text of which is set out at Appendix C.

STATEMENT OF THE CASE

This is an action by eleven former and current students[2] (hereafter "the students") at three campuses of the State University of New York (hereafter "SUNY") against officials of the university and against the New York Public Interest Research Group, Inc. (hereafter "NYPIRG") to halt the use of the mandatory and non-refundable student activity fee, required to be paid each semester by each undergraduate student at the SUNY campus at Albany, to finance NYPIRG, a private entity, with whose political and ideological advocacy activities they disagree.[3] The claims for a permanent injunction, declaratory judgment and damages were brought pursuant to 42 U.S.C. §§ 1983 and 1985(3), 29 U.S.C. §§ 2201 and 2202, and the First and Fourteenth Amendments to the Constitution.

The students alleged that the payment of a portion of the mandatory student activity fee to NYPIRG violates their constitutionally protected rights of speech and association because NYPIRG is an organization which engages in political activity and political speech with which they do not agree and do not wish to be associated.

---

[2] During the course of the litigation a number of student plaintiffs discontinued their participation, and a number of matriculating students were added, so that at all times the plaintiffs included at least one current student.

[3] The original complaint, and subsequent supplemental and amended complaints filed in the action, sought a permanent injunction, declaratory judgment, and damages equal to the amount of each plaintiff's mandatory student activity fee payments paid over to NYPIRG during the student's years at SUNY. Prior to trial, the district court bifurcated the issues, and determined that it would try only the issue of injunctive relief. Because the only plaintiffs who were current students at that time were attending only one school, the SUNY campus at Albany, the trial was limited to facts relating to that campus. The facts as to the other campuses are not substantively dissimilar.

All SUNY Albany students are required by a regulation, 8 N.Y.C.R.R. § 302.14 (hereafter the "Regulation"), adopted pursuant to section 355 of the New York Education Law, to pay a non-refundable student activities fee each semester. The amount of the fee is fixed by the Student Association, with an upper limit, $125.00 per year in 1989, set by SUNY. Those who fail to pay the fee are not permitted to register. The regulation provides that students at each SUNY campus are to decide, by referenda held at least every four years, whether to fund extracurricular activities by a mandatory or voluntary student activity fee. Pursuant to the Regulation, undergraduate students at the SUNY Albany campus (hereafter "SUNY Albany") voted in referenda whether the extracurricular programs at that campus would be funded by a mandatory or voluntary student activity fee. During the relevant period, a small minority (approximately 20%) of the enrolled undergraduate students voted in the student activity fee referenda. A majority of the students voting in the referenda voted for a mandatory fee.

The student activity fees paid by all undergraduates at SUNY Albany fund the student association's student activity budget. That budget is submitted by the student government to the president of SUNY Albany for review. Under the Regulation, all allocations which the student association decides to include in its budget must fall within one of eleven categories in order to be approved by the SUNY campus administration. The only category which purportedly applies to the funding of NYPIRG is the first, "programs of cultural and educational enrichment".

Certification by the president of the SUNY campus that the student activities budget complies with section 302.14(c) authorizes the fiscal officer of each SUNY campus to collect the prescribed fee at registration. The fees so collected from each student are paid over to a disbursing agent designated by the student government and approved by the campus president or his designee.

The student association at SUNY Albany has consistently used the student activity fee to fund a variety of organizations,

including student ethnic groups (*e.g.* the Black Alliance, Fuerza Latina, the Irish Club, the Korean Students Association) and subject interest groups (*e.g.* the dance, theater and new arts councils), and "activist" groups (*e.g.* the Feminist Alliance, the Gay and Lesbian Alliance, the Revisionist Zionist Alternative ("RZA") and NYPIRG) and others. These groups, except for NYPIRG, were all based on the SUNY Albany campus.[4]

At all relevant times, the student association at SUNY Albany has included substantial amounts for NYPIRG in its budget. In each year during the relevant period, the President of SUNY Albany or his designee approved the student association student activities budget, including the allocation to NYPIRG.

The relationship between NYPIRG and the student association at SUNY Albany is different from that between the student association and campus groups. By the terms of a contract between NYPIRG and the student association, only NYPIRG, of the more than 50 student activities funded through the mandatory student activity fee, is funded on a per capita basis, *i.e.*, $3.00 per undergraduate student per semester. Pursuant to this contract, because there were approximately 9,500 enrolled undergraduates at SUNY Albany in academic year 1989-90, NYPIRG was allocated $57,600 for that year.[5] NYPIRG's allocation is also

---

[4] In addition to the activities that are included in the student association budget, and thus subsidized by students, there are student activities that are "recognized", but not funded. The "recognized" activities, including such groups as the Young Republicans and Young Democrats, are given access to campus facilities by the SUNY administration and are permitted to operate on campus.

[5] Of the many student activities that are funded by the mandatory student activity fee, only the allocation to NYPIRG, to United States Student Association and to the Student Association itself are lump-sum expenditures, with no itemization provided in the Student Association budget. By contract with the student association, NYPIRG receives four lump-sum distributions

(continued...)

unusual in that NYPIRG's funding is the subject of a separate advisory referendum held during some of those years. It is noteworthy that NYPIRG's paid staff members assisted in NYPIRG's campaign in these referenda and that in addition to their salaries NYPIRG pays for the cost of printing leaflets and posters out of its general funds. As a result, objectors' money pays for the costs incurred by NYPIRG to campaign against their position on funding, and to perpetuate a funding system they abhor.[6]

NYPIRG is a not-for-profit corporation incorporated in 1973 under the laws of the State of New York, with its principal office in New York City. NYPIRG is a state-wide organization, whose board of directors consists of students from the schools at which NYPIRG has chapters. Local campus chapters are responsible for implementing NYPIRG policy at participating schools, and cannot take positions contrary to those adopted and

---

[5](...continued)
each academic year from SUNY Albany.

The comparative magnitude of NYPIRG's allocation is enormous; it receives the largest stipend by far of all student groups, except for the student association itself, the state-wide umbrella organizations of student associations at all SUNY campuses, and a conference center used by numerous student groups. NYPIRG's generous stipend is even more striking on a per capita comparison: there were and are only about 40 students active in the SUNY Albany chapter of NYPIRG and only about 10 to 20 who were interns with NYPIRG; NYPIRG received $57,600 from the SUNY Albany Student Association, or over $1,400 per active student. By comparison, RZA, which had 25 to 30 active members, received a total of only $2,400, or less than $120 per active student. Other student activities, with the exception of the student government itself and the conference center, were allocated amounts on a per member scale and on a gross amount scale orders of magnitude less than NYPIRG.

[6] When student referenda were held at SUNY Albany regarding NYPIRG funding only a small minority of the registered students voted, typically no more than 20% of the undergraduate students.

approved by the state board.

Unlike other student groups funded by the student activity fee, NYPIRG is not solely a student group: its members include not only students (according to NYPIRG's by-laws, every student who pays a student activity fee which is used in part to fund NYPIRG, is a member, see App. at 8 A), but it also has "hundreds of thousands" of non-student contributors and approximately 40,000 "citizen members" who contribute at least $20 each per year. App. at 7 A.

Also unlike other student groups funded through the student activity fee, NYPIRG's principal executive offices are located off-campus in New York City, where most of its professional staff is based. NYPIRG employs a paid, full-time, non-student staff, more than half of whom are not located on any college campus. NYPIRG has approximately 15 registered lobbyists, all of whom are paid staff and none of whom is an undergraduate SUNY student. These NYPIRG paid staff members engage directly in lobbying the State Legislature and executive departments and agencies. Of all the student groups funded through the mandatory student activities fee, only NYPIRG has full-time paid lobbyists.

NYPIRG's overall budget is approximately $2.7 million, of which approximately 30% is derived from student activity fees, about 45% is obtained from door-to-door canvassing by paid canvassers, 15% is earned by "program activities", primarily NYPIRG's fuel-oil buying group, which serves primarily non-student homeowners, and 10% is grant income. Funds from all sources, except grants which may have restrictions, are commingled into a "general fund" from which all of NYPIRG's statewide expenses are paid. Hence, the student activity fee helps to pay all of NYPIRG's costs. App. at 6 A.

NYPIRG unquestionably has a program for affecting political and social action. App. at 8 A. From its inception, NYPIRG has pursued an ideological and political agenda, seeking

to achieve social change and to "shape public policy". The Court of Appeals held that "There is no doubt that NYPIRG, like many other student groups, is an ideological organization....While [the issues it pursues] range from local concerns...to international issues, they represent positions staked out by advocates and cannot be said to be neutral." App. at 8 A.

NYPIRG is the outgrowth of the 1960's student movement and the post-1960's consumer movement; its spiritual "father" is Ralph Nader, the well-known consumer advocate. The concept of "public interest research groups" ("PIRGs") was originally articulated in the book written by Ralph Nader and Donald K. Ross, ACTION FOR A CHANGE (revised ed. 1972). Nader's notion of the public interest research group is an organization "...composed of full-time professional advocates and able organizers recruited by and representing students as citizens [which] can have an enormous, constructive impact on society." [*Id.* at 11] Not only are PIRGs a vehicle for students to change society, they have taken on a particular ideological perspective.[7]

NYPIRG replicates Nader's blueprint in almost every

---

[7] A review of the issues on which NYPIRG took positions, and the positions they took on these issues during the decade of the 1980's disclose a discernible pattern and remarkable consistency over the period. Such consistency is surprising in an organization that is "directed by students", because during that period there would have been more than one complete turnover in student population. As Nader himself pointed out, however, the full-time staff provides the continuity.

Plaintiffs' expert witness at trial described NYPIRG's ideology as "statism": "NYPIRG invariably comes down on the side of regulation of activities." Thomas Carroll, one of the plaintiffs, also testified that NYPIRG, in his review of the positions it took when he was a student and later when he worked on the staff of the state legislature, generally favored increased government intervention. NYPIRG members themselves view the organization as having a left-of-center political or ideological "tilt". These observations are confirmed by a review of NYPIRG's own publications.

aspect: it is an organization that employs over 60 professionals, including lawyers, paid lobbyists, scientists, professional organizers and others, whose salaries account for approximately 54% of NYPIRG's annual budget of around $2.7 million, or approximately $1.4 million. Less than 20% of the salaries is paid to NYPIRG's campus-based "project coordinators".

Moreover, as the Court of Appeals recognized, NYPIRG spends a substantial amount of money on off-campus activities; indeed, the organization's focus is off-campus. NYPIRG's manual[8] distinguishes between student lobbies and PIRGs:

> The Public Interest Research Groups represent a different thrust in the post-1960's student movement. However, while student government lobbies [such as the Student Association of the State University, an umbrella group for student associations at SUNY campuses] focused on the role of "student as student", the PIRGs represented the concerns of "students as citizens." The student lobbies helped students protect their interests within the higher education system, the PIRGs directed student interest outwards into the surrounding community. [emphasis supplied]

NYPIRG's own description of its purpose demonstrates its fundamentally political character.[9] The "masthead" of each issue

---

[8] NYPIRG Board of Directors Manual at 9 [undated].

[9] While strictly speaking NYPIRG is "non-partisan", it clearly attempts not only to effect legislative and regulatory action, but also to influence the outcome of legislative, congressional and gubernatorial elections. It actively engages in the electoral process by publicizing candidates' positions on issues of concern to NYPIRG, and by sending "truth squads" to challenge candidates' positions on issues of concern to NYPIRG. In election years, an issue of Agenda is dubbed a "Special Election Issue", and is used to highlight candidates' positions on issues of concern to NYPIRG.

of Agenda for Citizen Involvement, NYPIRG's principal periodical, states: "NYPIRG's professional staff works to shape public policy and develop citizenship skills in the areas of consumer protection, government and corporate accountability, and economic and social justice." [emphasis supplied]. NYPIRG clearly has, and attempts to propagate, a "legislative program". Regularly, Agenda states the NYPIRG's political objectives and legislative program: each year an issue is subtitled "NYPIRG's Legislative Program".

Almost every issue of Agenda is replete with stories about NYPIRG's legislative victories, and almost every issue has an update on the status of bills NYPIRG is working to have enacted. NYPIRG broadly proclaims its lobbying successes. See App. at 8 A. NYPIRG's principal activities include substantial direct lobbying of state and local legislative bodies, executive agencies and regulatory bodies; community and group organizations; participation in coalitions of like-minded political or community action groups; and research in support of its positions.[10]

---

[10] Student activities in NYPIRG are directly related to NYPIRG's statewide political and legislative agenda. For example, students, both on campus and as legislative interns, work on organizing rallies, lobbying, writing reports, mobilizing the community and contacting the media on the same issues that the statewide organization and its paid staff lobby on. NYPIRG's "educational" activities are directly related to its legislative and social action program, and are designed to train students and community members in lobbying and other political techniques. NYPIRG does not educate students in the abstract or in theory, and it does not allow students to present both sides of the issue to any audience. Rather, it is a monolithic, result-oriented political advocacy group.

In 1989, NYPIRG had only six student legislative interns, and in 1988 it had only seven student legislative interns, only two of whom were from SUNY, and, as previously indicated, only between 10 and 20 SUNY Albany students per year have been actively involved in NYPIRG on-campus internships. Only approximately 40 have been involved in running the NYPIRG SUNY Albany chapter. These are insignificant numbers when compared with the undergraduate student population of the 17 or so SUNY

(continued...)

Many of the issues with respect to which NYPIRG has lobbied and sought to influence public policy during recent years have been focused on issues that do not affect students as students, and include lobbying or demonstrating (1) against nuclear generation of electrical power; (2) in favor of nuclear disarmament; (3) in favor of establishment of citizen's utility boards ("CUB"); (4) in favor of extension of the statute of limitations for toxic tort actions; (5) in favor of divestment by U.S. companies of their holdings in South Africa; (6) against garbage incineration, against landfills, and in favor of "total recycling"; (7) in opposition to the federal government's defense budget and policies; (8) against the use of irradiated food; (9) for increased child care; (10) against "misleading" advertising by insurance companies.[11]

The issues on which NYPIRG takes positions, lobbies, "educates the public", and organizes "the community", are matters of public controversy. Most are not "campus" issues. Individual campus chapters, and by extension, students at each campus, have no control over the issues on which they can work through NYPIRG because the issues on which NYPIRG members and chapters work must be approved by the 36-member statewide board of directors.[12] No one SUNY campus' chapter has more than four members on the board. There is, indeed, no local campus or individual initiative as to the projects a student may

---

[10](...continued)
campuses at which NYPIRG has chapters, and even glaringly insignificant compared with the 9,500 undergraduates at SUNY Albany alone.

[11] NYPIRG litigates and contributes funds to support litigation in furtherance of its program and objectives having little or nothing to do with student issues. Litigation is one of the five tactics listed in the NYPIRG Board Manual (at 67) to be used to achieve NYPIRG's political goals.

[12] The chairperson of the NYPIRG board admitted that the board was often not presented with divergent points of view during its deliberations, especially if the issue was "ongoing" and had been approved by a prior board.

undertake as a NYPIRG project.

NYPIRG's by-laws provide that any student who pays the student activity fee, even if, as at SUNY Albany the fee is mandatory, is a "member" of the organization. On the basis of this provision, NYPIRG claims to represent all students at the participating SUNY (and other public and private university) campuses. No other student group makes a similar claim to speak for all students.

NYPIRG was far from the only vehicle by which SUNY Albany students could participate in government or get "hands on" civics education. During the relevant time period, SUNY Albany permitted students to receive academic credit for participation in community, social or government work through projects, through internships, or through independent study courses taken under the supervision of a faculty member. Many students, including undergraduates, enrolled for internship credit through the School of Social Work's Community Service internship program, through which students obtain a course credit for volunteer work with a wide range of approved non-profit organizations, of which NYPIRG is only one of 274. Of these 274 approved non-profit organizations only NYPIRG and the student association itself were funded through the mandatory student activity fee, with the possible exception of a day care center that may have received some SUNY funds. None of the others were funded by the university or the student association.

The other 270-plus organizations through which SUNY Albany students have the opportunity to get "hands on" civics experience through internship programs for academic credit are not subsidized by the student body or the university. One striking example listed in the "Community and Public Service Program" manual as one through which students can earn credit for internship work is the State Assembly of New York.

The students challenged the forced funding of NYPIRG by commencing an action in the United States District Court for the

Southern District of New York. After a bench trial, the district court found that there was no infringement of the students' First Amendment rights by SUNY's transfer of student activity fee monies to NYPIRG, and also found that "the fact that some of NYPIRG's activities involve issues of public policy does not diminish its educational value. The educational value lies in the participatory civics training obtained by the students who take advantage of this opportunity." *Carroll v. Blinken*, 768 F.Supp. 1030, 1033 (S.D.N.Y. 1991). The district court also found that the funding of NYPIRG contributed to an "open forum for discussion and debate." *Id.* at 1035. The district court dismissed the complaint.

Although the Court of Appeals recognized the constitutional infringement inherent in the mandatory student activity fee, it found that SUNY had a "substantial interest" in fostering a rich extracurricular life for students (App. at 19 A), supporting the "educational" benefits of NYPIRG's teaching of specific, concrete skills in researching, public speaking, organization and advocacy to those who join it (App. at 20 A) and stimulating "uninhibited and vigorous discussion on matters of campus and public concern" (App. at 21 A). The Court of Appeals held, however, that these interests did not extend beyond the campus. App. at 24 A. The court also held that the membership provision of NYPIRG's by-laws directly infringed the students' rights of association. App. at 27 A.

The Court of Appeals affirmed the district court's judgment with respect to the allocation of student activity fee money to NYPIRG and the use of that money on campus, reversed in part, and remanded the case to the district court with instructions that the district court fashion a judgment that will ensure that NYPIRG "spend as much money at SUNY Albany as it receives from Albany students' fees, and eliminate NYPIRG's automatic membership scheme." (App. at 28 A).

REASONS FOR GRANTING THE WRIT

I

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT AND ALTHOUGH THIS COURT HAS NOT DETERMINED THE PRECISE QUESTIONS PRESENTED, THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S PRECEDENTS

This case implicates core constitutional values that are the hallmark of a free society and protect the rights of individuals from government encroachment. It concerns individual students' First Amendment freedom from being compelled to finance the political and ideological speech of others with which they do not agree.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990)(hereafter "*Keller*"), this Court explicitly acknowledged that the basis of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (hereafter "*Abood*") was "Thomas Jefferson's view that 'to compel a man to furnish contributions of money for the propagation of ideas which he disbelieves is sinful and tyrannical.'" [quoting I. Brant, James Madison: The Nationalist 354 (1948)]. This Court has implemented Jefferson's thought in the context of labor unions and bar associations. The Court of Appeals also quoted Thomas Jefferson, but emasculated his meaning by permitting a mandatory fee to be collected and given to a political advocacy group, so long as that group spends the equivalent amount on campus. This case gives this Court the opportunity to vindicate Thomas Jefferson's sage words in the context of colleges and universities.

The issue is a variation of the issue which this Court has taken up in the context of labor union fees and bar association dues. The continuing importance of the issue is shown by the number of times in recent years the Court has granted review in

cases concerning union fee and bar association dues arrangements. *E.g. Lehnert v. Ferris Faculty Association*, 500 U.S. ___, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991)(hereafter "*Lehnert*"); *Keller*; *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (hereafter "*Hudson*"); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984); *Abood*. This case presents an opportunity for the Court to apply the First Amendment and the teaching of these cases upholding the freedom from being compelled to finance political speech and action in the important realm of education.[13]

This Court has reiterated the rationale for the prohibition of forced funding of political activities most recently in *Lehnert*, where it recognized that

> By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." Maynard, 430 U.S. at 715....The First

---

[13] This case is important not only because it directly affects 9,600 students at SUNY Albany, and more than 100,000 students at the approximately 17 SUNY campuses that have NYPIRG chapters, but also because there are PIRG chapters, similarly funded out of student activity fees or the budgets of the student associations, on college and university campuses throughout the country, such as several City University of New York campuses, the University of Wisconsin, the University of Maryland, Rutgers (the State University of New Jersey), the University of Minnesota, Oregon State University, the University of Washington, Florida State University, Colorado State University, the University of New Mexico, the University of Connecticut, and others. Literally hundreds of thousands of current, and untold numbers of future, students at public colleges and universities will be affected by the ruling regarding mandatory funding of PIRGs. Moreover, a ruling by this Court in this case could well also affect the funding of other ideological and political action groups which are subsidized by student governments out of mandatory fees.

> Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights...is constitutionally impermissible.

114 L.Ed.2d at 591.

The Court of Appeals recognized that the SUNY funding mechanism amounted to forced funding as much as the dues collection in the labor union and bar association cases, that it gives rise to "compulsion", and it also recognized that the use of compelled funding itself was sufficient to prove the violation of the students' associational rights. App. at 14 A - 16 A.

In upholding the use of mandatory student activity fee money to finance NYPIRG's concededly ideological political activities on campus, and requiring merely that a system be implemented to insure that NYPIRG spends the same amount on campus as it receives from student fees, the Court of Appeals (i) failed to follow the precedents of this Court in *Abood* and its progeny; (ii) failed to find that the interests of the state are "compelling", as required by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Hudson*, and most recently in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 139, 108 L.Ed.2d 652 (1990);[14] and (iii) failed to determine whether, even if the state's purposes are compelling,

---

[14] In *Austin v. Michigan Chamber of Commerce*, *supra*, this Court applied the compelling state interest standard in upholding the Michigan Campaign Finance Act, which prohibits corporations from using corporate treasury funds for independent political expenditures, and required instead that separate, segregated funds be used for such expenditures. 108 L.Ed.2d at 662. The Court applied both the "compelling governmental interest" and "narrowly tailored" criteria.

that funding of political groups on campus by a mandatory fee is a means "carefully tailored" to avoid unnecessary infringement of dissenting students' First Amendment rights, as mandated by this Court in *Hudson*.

This Court's teaching, in the mandatory fees line of cases from *Abood* to *Keller* to *Lehnert*, is that to justify the burden on dissenters' core First Amendment freedoms the state must demonstrate a "compelling" interest that is being served by the burdensome regulation, that the regulation be "narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Hudson*; *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1968) and that the activities thus funded be "germane" to the compelling state interest.[15]

---

[15] The Court of Appeals' apparent conclusion that a First Amendment intrusion may be justified by something less than a compelling state interest is an incorrect reading of this Court's cases. It rests, at bottom on the view that this Court in *Abood* displaced the compelling state interest test -- the traditional strict scrutiny standard by which First Amendment intrusions are measured -- with a "germaneness test", and that "germaneness" is a lower standard. Petitioners submit that *Abood* did not substitute "germaneness" for "compelling interest".

The Supreme Court plurality in *Abood* built its reasoning initially on an identified compelling governmental interest in labor peace. Only then did Justice Stewart employ "germaneness" in his analysis of the permitted intrusion on the non-members' First Amendment freedoms (*see also Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 at 455-456 (1984)). As applied in *Keller*, the concept of "germaneness" is applied to determine whether the use of compelled funding is appropriate to achieving the "compelling" state interest of regulating the bar.

In this case, therefore, the SUNY defendants were obligated to demonstrate a compelling state interest justifying the use of governmentally enforced exaction of contributions from students to finance political and ideological speech and action by NYPIRG. Only if such a compelling interest is shown, does the inquiry turn to whether the use of the money is "germane" to that state interest. The concept of "germaneness" incorporates the notions of relatedness and appropriateness or suitability. Webster's New

(continued...)

There was no dispute in *Abood* that the union conferred benefits on non-member employees, nor was there any dispute in *Keller* that the California State Bar performed functions that were useful or even necessary for the legal profession. The issue in the instant case, as it was in those cases, is whether particular activities of the organization whose funding is challenged are necessary to its discharge of its compellingly necessary or useful functions. Thus, in *Keller*, this Court adopted the *Abood* analysis that activities of private groups, even those vested with functions legislatively recognized as in the public interest, can be financed from mandatory dues only if the particular actions in question serve a state interest important enough to overcome the otherwise impermissible interference with dissenters' First Amendment rights. In *Keller* this Court held that the state bar could not constitutionally fund activities not germane to the legitimate goals which were mandated by the public interest, and examined various expenditures by the bar association. The court had little difficulty in finding that such activities as lobbying on issues such as use of polygraph tests by employers, prohibiting possession of armor-piercing ammunition, creating a right of action for air pollution, endorsing a gun control initiative, disapproving a senatorial candidate's statements on court review of a victim's bill of rights, endorsing a nuclear weapons freeze initiative, and opposing limitations on federal court jurisdiction over abortion, school

---

[15](...continued)
Twentieth Century Dictionary (Unabridged)(2d Ed. 1980) defines "germane" as "1. closely related; closely connected; relevant, appropriate...." And it defines "appropriates as "3. fit or proper, suitable."

The "germaneness" notion is thus not a substitute for the required compelling state interest, but is an inquiry into whether that interest is being appropriately advanced by the particular use of extracted funds. That is as far as the majority in *Abood* found it necessary to go. This approach represents no deviation from the teaching of *Elrod v. Burns*, 427 U.S. 347, 362 (1976) and *Hudson*, 475 U.S. 292 (1986) or *Roberts v. United States Jaycees, supra*. A legitimate or "substantial" state interest is not sufficient to justify an infringement of core First Amendment rights. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

prayer and busing cases were at one "extreme end[] of the spectrum" for which compulsory dues could not be used. 110 L.Ed.2d at 15.[16]

In light of this Court's recent decisions in *Keller* and *Austin*, and consistent with *Abood*, the Court of Appeals' upholding of the use of student fees to fund political speech without identifying a compelling state interest for such use of students' money was error.

By merely drawing the line at the campus gate, and allowing forced funding of on-campus political speech, the Court of Appeals perpetuated the fundamental violation of students' First Amendment rights, and failed utterly to articulate a meaningful standard by which to draw the correct line[17] between the students' rights of speech and association and the interest in a free and vibrant exchange of ideas. This Court has never sanctioned the notion that government may restrict the speech rights of some to enhance the voice of others; indeed, "the concept that the government may restrict the speech of some elements of society in order to enhance the...voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1979).

---

[16] The First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), applying *Keller* held that "Political activities, including lobbying, may be funded from compulsory dues so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal service....[T]he bar could not use dissenting members' funds to promote a system of no-fault automobile insurance, endorse a pro-life amendment...or generate support for a death penalty." 917 F.2d at 633. The similarity of the issues the Supreme Court found non-fundable out of compulsory bar association dues in *Keller* (and the First Circuit in *Schneider*) and the kinds of issues on which NYPIRG takes positions is apparent.

[17] The Court of Appeals was self-conscious of the fact that it was not drawing a "neat" line. App. at 28 A.

By approving forced funding of NYPIRG's political speech, the Court of Appeals limits students' free speech rights[18] in the supposed interest of the right of others to speak.[19] The right of others to speak is not threatened by Petitioners, so long as the speech is "free", not only in the sense that it is not restricted, but also in the sense that it does not make unwilling students the "instrument for fostering...an ideological point of view" they find unacceptable. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The reasoning of the Court of Appeals would permit (perhaps require) the student association to fund avowedly racist, fascist, communist, anarchist, nihilist, or other political groups if their activities take place on campus, regardless of their offensiveness to some students.[20] Again, we emphasize that all student groups have a prima facie right to speak on campus, but they do not have a right to use the money of those who do not share their views to propagate those views.[21]

---

[18] These rights are limited because, as this Court said in *Wooley v. Maynard*, 430 U.S. 705 (1977), compelling speech is no less an infringement than banning or limiting speech, and because each student's funds, which might be used for that student's own speech, are reduced by the amount paid to the bursar, given to the student association and then sent to NYPIRG.

[19] By requiring only that the district court fashion a remedy that ensures that NYPIRG spend as much on campus as is extracted from students merely encourages NYPIRG to intensify its on-campus political organizing and indoctrination.

[20] To ensure that funding of speech was "content neutral".

[21] It is here that the distinction between "recognized" and "funded" activities is most appropriate. The university can recognize groups engaged in political speech and action, such as the College Republicans, Young Democrats, or Young Socialists, and may be obliged to make available to them facilities such as meeting rooms (see *Widmar v. Vincent*, 454 U.S. 263 (1981)), but it is not appropriate for SUNY to finance their speech using the money of unwilling students.

The Court of Appeals found that three governmental interests were furthered by the use of the mandatory student activity fee to finance NYPIRG. The state interests identified were (1) the general promotion of extracurricular activities; (2) the facilitation of "participatory civics training"; and (3) the stimulation of robust campus debate on a variety of public issues. App. at 19 A.

Rather than using the "compelling" state interest test, however, the Court of Appeals utilized a "substantial government interest" standard, heretofore used primarily in cases which arose out of the state placing time, place and manner restrictions on expressive conduct.[22] Indeed, there are no decisions of this Court in compelled dues or fees case that have used the looser standard.

In scrutinizing the substantiality of SUNY's interest in funding NYPIRG with student money, the Court of Appeals "accord[ed] wide latitude to universities to define and carry out their own educational missions," citing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589 (1967), and *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). App. at 18 A. Petitioners do not take issue with the general proposition that courts should not interfere with genuinely academic decisions of universities on matters within the proper realm of academic freedom. The universe of these decisions is, however, limited to matters of "who may teach, what may be taught, how it will be taught, and who shall be admitted to study" (Justice Frankfurter, concurring in *Sweezy v. New Hampshire*, 354 U.S. at 263, quoted by Justice Powell, announcing the judgment of the court in

---

[22] The Court of Appeals cited *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989); *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981); and *United States v. O'Brien*, 391 U.S. 367, 377 (1968). These cases are inapposite to the issue of compelled funding of political speech.

Regents of Univ. of Cal. v. Bakke, 438 U.S. at 312-13). Petitioners also agree, that, absent an infringement on an individual's constitutional or statutory rights under the guise of academic decision-making, the courts should not intervene in these matters. But it is also indisputable that students do not surrender their constitutional rights at the school house gate. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969); *see also Healy v. James*, 408 U.S. 169 (1972). Deference to the determination of educators is not appropriate when their decisions infringe students' core constitutional rights. Further, the decision to fund NYPIRG does not fall within the confines described by Justice Frankfurter as the proper scope of academic freedom.

The Court of Appeals held that the funding of NYPIRG achieves an important governmental purpose because a broad extracurricular program is deemed important by educators,[23] and because SUNY Albany's president and the district court found that NYPIRG contributes to the education of students. From this, it made a transition to a standard of constitutional scrutiny that merely seeks to determine whether the state's interest would be less effectively served absent the activity fee regulation. App. at 23 A. The Court of Appeals, however, missed the mark, because while funding an extracurricular program may be educationally useful, funding political speech on campus is not necessary to a satisfactory extracurricular program, nor did it find that mandatory

---

[23] The Court of Appeals ignored the distinction drawn by this Court between core educational, *i.e.* curriculum related, decisions and decisions regarding non-classroom, extracurricular activities. As the Court stated in *Board of Education v. Pico*, 457 U.S. 853, 869 (1982) concerning a school board's attempt to censor the books in the school library, "Petitioners [the school board] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway."

funding of the extracurricular program was a "narrowly tailored" intrusion.[24]

Nor can the mandatory funding of NYPIRG be justified as furthering a compelling state interest in teaching civic duty, when student participation in such activities is purely voluntary,[25] and when SUNY Albany itself recognizes over 200 other activities, including government internships, none of which is funded out of the mandatory fee, as qualifying for academic credit as community service. The appropriate inquiry is not, as the Court of Appeals thought, whether NYPIRG has an educational aspect, or whether it confers educational benefits,[26] but whether the conferring of the particular educational benefits is of "compelling interest" to the state.[27]

---

[24] Nor could it have, because the SUNY student fee regulation itself provides for an option of a purely voluntary student activity fee. Thus the state itself, and the educators themselves, have recognized that the mandatory nature of the fee is not necessary to ensure "stability" and "predictability". *Cf.* App. at 24 A.

[25] It is difficult to reconcile a "compelling" state interest in education with voluntary participation by the student body.

[26] The students readily acknowledge that virtually any activity may have some "educational" aspect. Indeed, as the district court remarked, the petitioners in this case have been "educated" about the disadvantages of being on the losing side, much as a victim of a crime might be "educated" about the perils of being in Times Square after midnight by crossing paths with a felon. The state has no legitimate business imposing that kind of learning on its citizens.

[27] This case is quite different from cases in which students (or their parents) object to the use of tuition to pay for courses they find objectionable, for course selection falls squarely within the core educational discretion of the faculty and administration. It is also vastly different from a challenge to the use of a student activity fee to finance the football team or the glee club, because those activities do not implicate political speech.

The Court of Appeals held that the "most important" interest that SUNY Albany tries to advance by funding NYPIRG and other groups from the compulsory student activity fee is to "stimulate uninhibited and vigorous discussion on matters of campus and public concern" and that by funding campus interest groups the activity fee "create[s] a forum for expression of diverse views..." App. at 21 A. The Court of Appeals cited several cases for the general proposition that our democracy encourages the free and robust exchange of ideas.[28] The students have no quarrel with that proposition, indeed they champion it. The key word, however, is "free". A forum of ideas created out of forced exaction of financial support from dissenters can hardly be called "free".[29] Indeed, the notion that a "free marketplace" of ideas can be created and encouraged by involuntary contributions is an oxymoron. The strength of an idea, that is, its acceptance in the "marketplace", is often best measured by how many will volunteer to spread the idea or to help finance its propagation.

---

[28] We submit that the Court of Appeals lost sight of the obvious fact that prohibiting mandatory funding of NYPIRG and other political and ideological groups "in no way...present[s] the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives", *Galda v. Rutgers*, 772 F.2d 1060, 1064 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), and thereby participate fully in the campus forum. Indeed, of all the organizations on campus, NYPIRG, with its budget of $2.7 million, would seem more than able to hold its own, even if it lost student dues and its income were reduced to a mere $1.9 million.

[29] The view expressed by the Court of Appeals at App. 21 A - 23 A that forced funding is properly used to create a "forum" of ideas is irreconcilable with its statement, at App. 17 A, that "The fact that appellants' student activity fee will also compel them to speak through a number of other campus groups in addition to NYPIRG in no way heals the constitutional infirmity; it simply means that students must fund more than one unwanted view." The irony is that the funding of political speech by any, or all, groups disadvantage[s] the students, including Petitioners, who are opposed in principle to state intervention in the "marketplace of ideas".

The Court of Appeals cited no authority, and we have found none, for the proposition that private funds can legitimately be used to finance a political group with which the students disagree so that the group's voice in the public forum or public debate is enhanced.[30] Indeed, this Court has taken the contrary position. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1979). The cases cited by it are far off the mark. Neither *Healy v. James*, 408 U.S. 169 (1972), *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), *Associated Press v. United States*, 326 U.S. 1 (1945), nor *New York Times v. Sullivan*, 376 U.S. 254 (1964), cited by the Court of Appeals, have anything remotely to do with whether the government can require citizens to fund a forum through compulsory dues or fees.

The Constitution, permits, and perhaps requires (*see Widmar v. Vincent*, 454 U.S. 263 (1981)), the university to allow

---

[30] The case at bar does not involve the issue whether the government can use public monies to advocate a position on controversial issues. Here, the government is not speaking, it is a private group. And it is not even the government which is allocating resources, but the student association, a private group. The student association has no attributes of sovereignty; it is a special, limited interest group, like a labor union or bar association, and lacks the power of government. The difference between the student association and traditional government agencies and officials is exactly the same as the distinction between the State Bar of California and a state agency. *See Keller*, 110 L.Ed.2d at 13. The decision to make the fee mandatory is not made by the state, but by students. The student association budget, and thus the size of the student activity fee, is decided by the student association, not the school administration. The decision as to what organizations or activities are to be funded is not made by the SUNY administration or the SUNY Trustees, but by the student association, which has no expertise in education; SUNY officials only decide whether activities already approved for funding by the student association fall within the guidelines of the Regulation. The contract providing for payment to NYPIRG is between NYPIRG and the student association, not the SUNY Albany administration. There is no doubt that we are here confronted with involuntary funding of private political action and speech out of students' private property, not public funding of government action or speech out of general tax revenues.

political groups to speak on campus, to distribute leaflets, to put up posters and to use meeting facilities. It does not permit the university to force students to pay for any group's political leaflets or posters, or to subsidize the salaries of the group's paid staff who come to campus to direct or assist the political group.

The Court of Appeals did not find, nor could it have, that the mandatory funding of political action groups is either the least restrictive means of achieving the state's objectives, or even that it is "carefully tailored" to achieve those goals. Instead, the Court of Appeals found that "these interests would be less effectively served absent the activity fee distribution regulation." App. at 23 A. The "less effective" test is drawn from cases involving limitations on public demonstrations, not from forced funding cases, and is inapplicable.

As for the state's interest in supporting extracurricular life generally, section 302.14 of the Regulation evidences SUNY's recognition that voluntary student activity fees are appropriate (and, therefore, presumably "effective") in attaining that goal. If the state interest is in "the transmission of skills and civic duty", that opportunity is available through the more than 270 activities that are not funded through the mandatory fee but are recognized by the university administration itself as qualifying for academic credit.[31] If the state interest is the encouragement of a "forum", that can be, and is, achieved by sponsoring speakers' programs and the like, without funding the general activities of an avowedly

---

[31] Of course, there may be hundreds of others that have not found their way onto SUNY Albany's official list, and which are neither funded nor "credited", but which nevertheless impart advocacy and organizational skills and notions of civic duty. As the Third Circuit in *Galda* noted, "The compelling state interest in eliminating 'free riders' in the interest of preserving labor peace in the union dues context...does not exist in the circumstances here....nor do we believe that the educational experience which [is cited by the university] as justification could not be gained by other means which do not trench on the plaintiffs' constitutional rights." 772 F.2d at 1066-1067.

ideological group.

Moreover, because any showing by NYPIRG that it has spent the same amount on campus as it received in student fees is necessarily after the fact, the Court of Appeals' mechanism for ensuring that the "on campus"/"off campus" distinction will be observed violates this Court's ban against collecting dues before the dues payer is informed of how the money will be spent, and before the dues payer can challenge the expenditure, established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). As the Court of Appeals acknowledged, the student activity fee could be structured to separate out that portion used for political activity and political advocacy, and that part made voluntary. That is what *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and *Keller* require. The failure of the Court of Appeals to follow those cases is unexplained and inexplicable.

II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS

The decision of the Court of Appeals for the Second Circuit in this case is in direct conflict with the decision of the United States Court of Appeals for the Third Circuit in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied* 475 U.S. 1065 (1986). In both cases, the Courts of Appeals were faced with the question whether it is constitutional for a state university to require students, as a condition of matriculation, to pay a fee to support a PIRG, which both courts recognized to be a political and ideological organization. In both cases the same rationales were advanced by the state and PIRG to justify forced funding. The Third Circuit court said "no". The Second Circuit court has said

"yes", if the money is spent on campus.[32]

Galda involved the funding of New Jersey PIRG (NJPIRG) at Rutgers, the State University of New Jersey. The Third Circuit Court of Appeals found that NJPIRG was a political action group, whose activities were primarily devoted to changing conditions outside the university. Like NYPIRG, New Jersey PIRG afforded those comparatively few students who chose to participate in its programs the opportunity to learn public speaking, research techniques, and leadership, advocacy and other skills. Thus the trial court in *Galda* found, as did the trial court in this case, that the university had "made a carefully reasoned decision that PIRG is a valuable educational adjunct...", 772 F.2d at 1063, and "PIRG has a very substantial educational component...[that] significantly enhances the educational opportunities available for students...." *Id.*[33]

---

[32] The Third Circuit stated that it was not addressing the issue of whether the allocation of part of a the general activity fee to PIRG would be permissible. In *Galda* the NJPIRG portion of the student activity fee was separately itemized on the students' tuition and fees bill each semester. We submit that the difference between the Rutgers fee and the SUNY Albany fee is one of form, not substance. As we have pointed out above, the funding of NYPIRG is distinct from that of other groups at SUNY Albany, and similar to the funding mechanism for NJPIRG before *Galda* was decided because (1) it is based on a per student allocation unrelated to the number of students who actually participate in NYPIRG activities; (2) the student association has contractually obligated itself to fund NYPIRG; (3) there is a separate referendum on funding NYPIRG; (4) NYPIRG's allowance is a lump-sum, without an itemized budget as is the case for all other groups except the student association itself; and (5) the money is sent to NYPIRG's off-campus headquarters, where it is commingled with funds from NYPIRG's other revenue streams.

[33] As the Third Circuit in *Galda* noted, the educational advantages of NJPIRG described by the Court of Appeals "do not differ from those that might be obtained from working with, or for, an independent organization such as the Republican or Democratic Party, or a clearly religious group which has undertaken an active and vigorous proselytizing campaign", but

(continued...)

As the Third Circuit in *Galda* noted, however, "Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's frankly stated ideological bent. To that extent the educational benefits are only 'incidental' -- arising from or accompanying the principal objectives -- and subordinate to the group's function of promoting its political and ideological aims." *Id.* The experience gained from lobbying activities as well as advocacy, leadership, public speaking, and research might just as readily by obtained by membership in the University sponsored Legislative Action Committee, by participation in internships in various governmental agencies also available to Rutgers students, and through the work of other campus organizations." *Id.* at 1066. The same is true in this case.

As the Third Circuit acutely observed, "The objection to funding an outside entity through the 'neutral funding' procedure is that the result achieved is not neutral and does not achieve equal access. The process offers an opportunity for a majoritarian group to compel support from minorities in circumstances where no compelling state interest justifies the limitation on First Amendment rights." *Id.* at 1067. That is, of course, precisely what occurs at SUNY Albany.

The district court in this case was candid in acknowledging that the distinction between the case at bar and *Galda* was "slender", and that it felt that the dissent in *Galda* was "more applicable". The Second Circuit did not even try to reconcile its conclusion with the Third Circuit's holding that the funding of NJPIRG by a mandatory student fee was unconstitutional.

---

[33](...continued)
it could hardly be contended that student fees could be funnelled to such a group. "Yet, the educational component that the University presents here as justification would be precisely the same were the group one that clearly could not receive affirmative state support." 772 F.2d at 1065. The same is true in this case.

CONCLUSION

In a free society, government-sanctioned restrictions on freedom of speech and association must be justified by the most compelling governmental interest, and must be narrowly drawn to minimize the infringement on individual rights. Review by this Court of the decision of the Court of Appeals for the Second Circuit is necessary to clarify the constitutional protection afforded to students' First Amendment rights in the face of attempts to compel them to support repugnant political speech and action through mandatory student activity fees and to rectify that Court's expansive interpretation of government interest that will permit serious intrusion on free speech rights. The Court of Appeals has set an erroneous precedent by misconstruing the applicable decisions of this Court and creating a "forum for expression of ideas" justification for exacting private funds that could destroy or seriously distort the free marketplace of ideas on which our system of government is based. The petition for a writ of certiorari should be granted.

May 12, 1992

Respectfully submitted,

Martin S. Kaufman*
Douglas Foster

Atlantic Legal Foundation
Attorneys for Petitioners
205 East 42nd Street (9th Floor)
New York, New York 10017
(212) 573-1960
* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 698—August Term 1991

(Argued January 10, 1992 Decided February 13, 1992)

Docket No. 91-7877

THOMAS W. CARROLL, ROBERT J. CARROLL, MICHAEL E. MCCHESNEY, EMANUEL J. PANOS, EDWARD J. PRIOLA, CRAIG J. RUCKER, ROBERT T. SCHMIDLIN, BETH TURKOVIC GARFUNKEL, CHRISTINE MCCLELLAN, CHRISTOPHER SANDOR and SUSANNE ZIEGLER,

Plaintiffs-Appellants,

—v.—

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, GEORGE L. COLLINS, JR., D. CLINTON DOMINICK, JUDITH LASHER DUKEN, ARNOLD B. GARDNER, GURSTIN D. GOLDIN, JOHN L.S. HOLLOMAN, JR., NAN JOHNSON, EVERETTE JOSEPH, JUDITH DAVIDSON MOYERS, EDWARD V. MELE, VICTOR MARRERO, ROSEMARY SALOMONE, EDGAR A. SANDMAN, THOMAS VANARSDALE, DARWIN R. WALES, in their capacities as trustees of the State University of New York, JEROME KOMISAR, in his capacity as Acting Chancellor of the State University of

New York, VINCENT O'LEARY, CLIFFORD D. CLARK, ALICE CHANDLER, in his or her capacity as President and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Defendants-Appellees.

Before:

KAUFMAN*, PRATT and MINER,

Circuit Judges.

Appeal from a judgment for defendants of the United States District Court for the Southern District of New York (Owen, J.) in an action to enjoin defendant State University of New York at Albany from transferring, pursuant to state regulation, funds collected from plaintiffs' student activity fees to defendant New York Public Interest Research Group, Inc. Affirmed in part, reversed and remanded in part.

MARTIN S. KAUFMAN, Esq., New York, NY, (Atlantic Legal Foundation, Inc., Douglas Foster, New York, NY, of counsel), *for Plaintiffs-Appellants.*

---

* Judge Kaufman wrote this opinion and circulated it to the other members of the panel before his death on February 1, 1992.

JOCELYN LEE JACOBSON, Esq., New York, NY, (Alexander R. Sussman, Fried, Frank, Harris, Shriver & Jacobson, New York, NY, of counsel), *for Defendant-Appellee New York Public Interest Research Group, Inc.*

ANDREA GREEN, Assistant Attorney General of the State of New York, Albany, NY (Robert Abrams, Attorney General of the State of New York, Albany, NY, of counsel), *for Defendants-Appellees State University of New York.*

KAUFMAN, *Circuit Judge*:

Thomas Jefferson recognized that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1] At the same time, our nation's universities preserve a longstanding tradition of tolerating and even encouraging the propagation of all sorts of disbelieved opinions. We are asked today, in a case that involves competing concerns of the First Amendment, to resolve the conflict that occurs when Jefferson's "tyrannical" compulsion occurs in a collegiate setting. On the one hand, university students oppose as compelled speech and association their college's allotment of a portion of their mandatory student activity fee to an organization whose speech and actions they reject. On the other hand, the university, by disbursing the fee proceeds to a variety of campus groups,

1 *Keller v. State Bar of California*, 495 U.S. ____, 110 S.Ct. 2228, 110 L.Ed.2d 1, 11 (1990) (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)).

aims to foster spirited and uninhibited debate about campus and public issues. We hold that a state university may constitutionally allocate students' activity fees to a group with whose speech some students disagree, as long as that organization spends the equivalent of the students' contribution on campus and thus serves the university's substantial interests in collecting the fee. We also hold that a campus group may not define its membership to include all fee paying students, but may extend membership only to those who seek it.

BACKGROUND

This action began with a complaint by several students of the State University of New York at Albany[2] ("SUNY Albany") against their university and the New York Public Interest Research Group, Inc. ("NYPIRG"). Like all SUNY Albany students, appellants are required by a regulation adopted pursuant to New York's Education Law § 355 ("the regulation")[3] to pay a non-refundable student

2 The students have had varying ties to this litigation. Michael McChesney was academically dismissed between trial and judgment but is eligible to apply for reinstatement. Hence Judge Owen denied defendants' motion to dismiss, made on mootness grounds, calling McChesney's claim "capable of repetition yet evading review." Carroll v. Blinken, 768 F.Supp. 1030, 1031 n.1 (quoting Honig v. Doe, 484 U.S. 305, 318 (1988)). McChesney moved under Fed. R. Civ. P. 20 to add three new plaintiffs: Christine McClellan, Christopher Sandor and Susanne Zeigler. All are currently enrolled at SUNY Albany, and all assert a right to relief involving the same issues of law and fact and arising out of the same transaction or occurrence as McChesney's. The motion was therefore granted. Thomas Carroll, Robert Carroll, Craig Rucker, Emanuel Panos, Beth Turkovic Garfunkel, Edward Priola and Robert Schmidlin all graduated before trial, and thus seek damages only.

3 The regulation, 8 N.Y.C.R.R. § 302.14, provides that students at each SUNY campus will decide, by referendums held at least once every four years, whether to fund extracurricular activities by a mandatory or a voluntary student activity fee. During the years appellants attended SUNY Albany, and now, the fee is mandatory.

activity fee each semester. Those who fail to pay the fee, $55 as of 1989, are not allowed to register. Student fees are pooled and, according to the regulation, redistributed to a variety of extracurricular organizations, "provided that the purpose and activities of the organization[s] are of [an] educational, cultural, recreational or social nature." If the organizations fit that description, they must then request activity fee funding from, and be selected by, the SUNY Albany Student Association, and approved for such funding by the university's president.[4] The Student Association and the president have consistently used this process to fund a great many organizations, including athletic, social, recreational, service, ethnic and political organizations. For instance, the fee supports an Irish Club, the Korean Students Association, Dance, Theater and New Art Councils, the Black Alliance, the Pan-Caribbean Association, a geography club, Fuerza Latina, the Femi-

4 The Student Association budget may only allocate funds to:

(i) programs of cultural and educational enrichment;

(ii) recreational and social activities;

(iii) tutorial programs;

(iv) athletic programs, both intramural and intercollegiate;

(v) student publications and other media;

(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature;

(vii) insurance related to conduct of these programs;

(viii) administration of these programs;

(ix) transportation in support of these programs;

(x) student services to supplement or add to those provided by the university; and

(xi) remuneration to student officers for service to student government.

8 N.Y.C.R.R. § 302.14(c). Once the Student Association completes its budget allocating funds to various campus groups, SUNY Albany's president must then certify that Student Association funds are spent in one of the above 11 ways. *Id.*

nist Alliance, a campus Amnesty International group, the Revisionist Zionist Alternative, the Gay and Lesbian Alliance, NYPIRG and others. Activities conducted by the more ideological organizations range from sponsoring debates, supporting campus journals and newsletters, showing films, and lobbying.

By the terms of a contract between NYPIRG and the Student Association, NYPIRG receives $3.00 from each student's activity fee per semester, which amounts to a total of $57,600 for SUNY Albany students per year. NYPIRG is a statewide, not for profit corporation based in New York City with chapters on nineteen SUNY campuses. It is a self-described "nonpartisan research and advocacy organization directed by New York State college and university students." At SUNY Albany, students decide in an advisory referendum held every two years whether to fund NYPIRG through the activity fee, and have always approved it. NYPIRG's Board of Directors is composed entirely of students elected by participating students at the different SUNY chapters. Its overall annual budget is $2.7 million, roughly 30% of which is derived from campus activity fees. The remainder comes from door-to-door collecting (45%), commissions on NYPIRG's fuel buyers groups (15%), and grants (10%). Funds from all sources except grants are commingled into a "general fund," from which all of the organization's statewide expenditures are paid. Hence, student activity fee money helps to pay all of NYPIRG's bills.

NYPIRG spends money from its general fund both at and away from the SUNY Albany campus. For example, at the Albany campus, NYPIRG sponsored a professor's forum on the arms race, a symposium on women's health care, and a debate between representatives of presidential campaigns. Albany students used NYPIRG funds to study

the state of lighting in campus parking lots and underground corridors, aiming to enhance safety. They researched safety questions surrounding the use of irradiated food and worked for their elimination on campus. They undertook surveys on the drinking age, local supermarket pricing, local pharmacy compliance with the generic drug laws, and area bank policies on student credit cards. NYPIRG financed research at Albany on divestiture of state money from private institutions doing business in South Africa, the state statute of limitations in toxic tort actions, nuclear power issues and child care. Using NYPIRG funds, Albany students have participated in a small claims court assistance program, local toxic waste clean-ups, and voter registration drives.

NYPIRG spends considerable general fund money away from SUNY Albany as well.[5] Most obviously, it draws from this account to finance activities at the eighteen other campuses where NYPIRG has chapters. Likewise, general fund monies cover the administrative expenses that inevitably attend a large statewide organization. NYPIRG also uses the general fund to pay the salaries of some 60 full-time professional staff members, all but one of whom, as far as we can tell, is employed off the Albany campus. These employees are spread among other participating campuses, NYPIRG's legislative office at the state capitol, and NYPIRG headquarters in New York City. Their salaries consume 54% of NYPIRG's budget. They are scientists, lawyers, researchers, and organizers who, according to NYPIRG's bi-monthly publication

5 This is to expected, since NYPIRG is not primarily a SUNY Albany student group. SUNY Albany President Vincent O'Leary testified at trial that NYPIRG differs from all other campus organizations in that it is not based principally at the Albany campus. Indeed, NYPIRG boasts of 40,000 "citizen members," who contribute to NYPIRG and are not students at all.

Agenda, work "to shape public policy and develop citizen participation in areas of consumer protection, government and corporate accountability and economic and social justice." In pursuit of these goals, some NYPIRG staff members also lobby state legislators and executive officials. They do this both alone and with student members and interns.[6] One issue of *Agenda* boasts that NYPIRG's lobbyists had "helped pass over 80 pieces of legislation" by 1988.

There is no doubt that NYPIRG, like many other student groups, is an ideological organization. The issues it pursues, both at SUNY Albany and elsewhere, are chosen by the student Board of Directors. While they range from local concerns like the rates of area taxicabs to international issues like arms control, they represent positions staked out by advocates and cannot be said to be neutral. The organization is for some things—divestment, greater environmental protection, governmental accountability—and against others—irradiated food, nuclear power, increased defense spending. As the district court stated at trial: "I think you can sort of assume that from the state of this record without any dispute that [NYPIRG] does have a program for affecting political and social action. It is unquestionably so."

One final aspect of NYPIRG requires mention. NYPIRG's by-laws provide that any student who pays the student activity fee, as all SUNY Albany students must, is a "member" of the organization.[7] Apparently on the

6 SUNY Albany awards academic credit to a limited group of students who perform internships with NYPIRG.

7 The by-law provision is as follows:

II. *MEMBERSHIP*

A. *Participating School*

(*footnote continued*)

strength of this by-law, NYPIRG claims in publications to represent all students at the nineteen participating campuses. The record reveals no other student group with a similar, automatic membership plank, nor any other group that claims to speak for all SUNY Albany students.

Opposed to NYPIRG's causes and methods, and dismayed to find themselves financing them and, thus, NYPIRG members, appellants brought an action in the United States District Court for the Southern District of New York (Owen, J.) pursuant to 42 U.S.C. §§ 1983 and 1985(3), 29 U.S.C. §§ 2201 and 2202, and the First and Fourteenth Amendments of the Constitution. They sought to enjoin as unconstitutional compelled speech the allotment of part of their student activity fee to NYPIRG. After denying cross-motions for summary judgment, the district court conducted a six day bench trial. Finding no infringement of appellants' First Amendment rights by SUNY's transfer of activity fee monies to NYPIRG, and convinced that NYPIRG's use of such fees brings educational benefits to Albany students, the district court denied appellants' claim for injunctive relief and dis-

---

A participating school is any public or private college, university, junior college, graduate school, or other institute of learning in New York State which makes an annual financial contribution to NYPIRG and which meets the standards of these By-Laws. An annual financial contribution is defined as funds paid as a substantial part of the term's collection, as determined by the State Board. The State Board, however, may refuse to admit any proposed participating school.

B. *Member*

A member is any student at a participating school except for:

1) At a school with a refund procedure, one who requests a refund.

2) At a school without a refund procedure, one who indicates her/his wish not to be a member.

Membership certificates or cards need not be issued by NYPIRG. Membership is effective and evidenced by the donation, refund, and other records kept by NYPIRG.

missed the action. *Carroll v. Blinken*, 768 F.Supp. 1030 (S.D.N.Y. 1991). Appellants now appeal, and we affirm in part, and reverse and remand in part.

DISCUSSION

As was noted at the outset, this case is one of competing interests. It pits students who object to bankrolling an organization whose political speech and activities they strongly oppose, against their university, whose considered educational judgment it is that students ought to support a wide variety of campus speech, civic activism, and extracurricular activities. We begin by considering the students' First Amendment claims; it is against their right to be free of compelled speech that we weigh the university's interests in compulsion.

I. *Objecting Students' First Amendment Interests*

Appellants' central claim is that the First Amendment prohibits their being charged for and associated with the political activities of an organization they disagree with. Since at least 1943, when the Supreme Court decided *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), it has been firm constitutional doctrine that the state cannot constitutionally compel individuals to speak or think in prescribed ways. In *Barnette*, the Court struck down a West Virginia law intended to bolster Americanism by compelling public school students to salute and pledge allegiance to our flag. As Justice Murphy concurred, the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 645.

What offended the First Amendment in *Barnette* was the image of state as molder of minds. That we were then

at war with governments founded expressly on that ideal, and indeed that the salute West Virginia school children were compelled to perform each morning seemed to parents and others to be "too much like Hitler's," could not have been far from the Justices' minds. *Id.* at 627, 641. Hence that passage so quoted by free speech enthusiasts ever since: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. But the freedom to keep silent as well as to speak is grounded in something broader than a national fear of the state. It is equally the product of our view of personhood, which encompasses what the Supreme Court later referred to as "freedom of thought," "freedom of mind" and a "sphere of intellect and spirit." *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977) (quoting, in part, *Barnette*, 319 U.S. at 637, 642). Were there no state at all, or were it inalterably benign, our conception of what it means to be human would still lead us to respect the individual autonomy of intellect and will enshrined in the First Amendment. *See Galda v. Rutgers*, 772 F.2d 1060, 1064 (3rd Cir. 1985), *cert. denied, New Jersey Public Interest Group, Inc. v. Galda*, 475 U.S. 1065 (1986) ("*Galda II*") (compulsory speech acts as "limitation on freedom of conscience").

The principles of *Barnette* have since been applied in a variety of contexts. In *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961), the Court struck down as invasive of "freedom of belief and religion" Maryland's requirement that civil servants utter oaths affirming belief in God. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held that a newspaper could not be compelled to print a reply by a political candidate criticized in

the paper. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court commanded that sheriff's employees could not be compelled to support a political party in order to keep their jobs. In *Wooley*, the Court invalidated New Hampshire's law compelling drivers to endorse that state's motto, "Live Free or Die," by displaying it on their license plates. And in *Pacific Gas & Electric Co. v. Pacific Utilities Commission of California*, 475 U.S. 1 (1986), a utility commission's rule requiring a company to distribute a consumer organization's communications with its bill was overturned as compelled speech. The Court reaffirmed the "concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id.* at 11 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524, 559 (1985) (quoting *Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255 (1968) (emphasis in original))); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("[f]reedom of association therefore plainly presupposes a freedom not to associate").

The First Amendment's protections against forced speech and association also underlay the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, on which appellants place greatest reliance and which is most relevant to the case at hand. In *Abood*, non-union teachers were compelled by Michigan's agency shop rules to pay a service charge to the union that negotiated their collective bargaining agreement with the Detroit Board of Education, since they benefitted along with union members from the agreement's negotiation and operation. Claiming that the union's use of their service charge to express political opinions and support candidates constituted compelled

speech, the non-union teachers sued. The Court agreed, holding that while the union's use of dissenting teachers' money to finance activities germane to collective bargaining is constitutional, *id.* at 225-226, use of it to finance political or ideological causes the teachers do not support violates the First Amendment. "*[A]t the heart of the First Amendment*," the Court stressed, "is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-235 (emphasis added).

In *Abood*'s wake has come *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), which reaffirmed *Abood* and ruled on the germaneness of a variety of union practices, *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which strengthened union procedures to ensure that objecting employees did not finance nongermane speech, *Keller v. State Bar of California*, 495 U.S. __, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), which prohibited a state bar association from using members' dues on political speech unrelated to legal regulation or services, and *Lehnert v. Ferris Faculty Association*, 500 U.S. __, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), which sanctioned union expenditures of dues on expenses not expressly authorized by statute and for national affiliate activities that benefit local members.

Like non-union employees bound to pay fees to a union that in turn spends the money on political speech, or members of a state bar whose dues finance ideological activities like lobbying, appellants see the student activity fee and its attendant automatic NYPIRG membership as vehicles for compelled speech and association. *See Galda II*, 772 F.2d at 1067 (*Abood* relevant in university context, despite differences between colleges and unions).

We agree: NYPIRG engages in political speech, the students help to finance it, and that aid and the accompanying membership is compelled. First, no one doubts that NYPIRG "speaks" for First Amendment purposes. The district court concluded as much, as was noted above, because the record is clear that NYPIRG advances certain positions on issues of public policy through research, campus speakers, lobbying the legislature, intervening in lawsuits, community organizing, brochures, and other methods. Were the government to try to prevent or penalize these activities, it would certainly be restrained by the Constitution. Second, it is undisputed that all students pay $3.00 each for such speech, as money collected from student activity fees is lumped with NYPIRG's other funds at the statewide level and is distributed to individual chapters, staff members and lobbyists to support the group's efforts. That this slice of the student activity fee is briefly in the hands of the Student Association while being funnelled from students to NYPIRG does not diminish the fact that a transfer has taken place. Students are also drafted into NYPIRG according to the group's automatic membership provision. Finally, this membership and the transfer of funds hinges not on the ideological affinity between member and group, contributor and recipient, but rather on the compulsion inherent in conditioning registration, and hence matriculation and graduation, on payment of the fee. A student cannot pay the full fee without paying NYPIRG and he or she cannot continue as a student without paying the full fee. Whether justified or not, that is forced association and speech—just as conditioning the practice of law in *Keller*, and the retention of work in *Abood*, *Ellis*, *Hudson*, and *Lehnert*, on fee payments gave rise to compulsion in those settings.

Appellees maintain, and the district court agreed, that objecting students have not been forced to speak through and associate with NYPIRG because the connection between the two is too attenuated. As the court put it, "the fee supports over 100 diverse groups, and the contributions of the fee are paid by several thousand students. Thus, no close association exists between plaintiff and NYPIRG, and plaintiff's First Amendment rights are not infringed." *Carroll*, 768 F.Supp at 1035. As a matter of fact, this proposition may be doubted; as a matter of law, appellants need not show a "close[r] association" than they have to establish an infringement of First Amendment rights.

In fact, appellants are linked more closely to NYPIRG than to other recipients of the student activity fee because, as far as we can tell, only NYPIRG makes members out of all SUNY Albany students. Having deputized all of its unwitting activity fee contributors and then stating in some of its materials that it represents all fee paying students, NYPIRG cannot now conveniently restore the distance between itself and students when it suits the organization's legal needs. And, even absent the membership provision, it cannot so easily be assumed that outsiders do not link students with at least some of the causes pursued by student organizations, especially when those causes are furthered off campus. As the Fourth Circuit said of the plan of the University of Maryland's PIRG chapter to use activity fees to support litigation, "suits and actions would assume in the public mind the stature of declarations of University thought as well as that of its entire student body, while in truth it could well be neither." *Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864, 867 (4th Cir. 1977).

Perhaps more importantly, First Amendment jurisprudence does not require appellants to demonstrate a closer connection between NYPIRG's speech and themselves to make out a constitutional violation. While appellees are correct that *Barnette* and *Wooley* involve citizens compelled actually to speak or carry a message, nowhere did those opinions state or imply that compelled speech has only one *modus operandi*.[8] On the contrary, *Abood* and its progeny illustrate that there is linkage enough in being compelled to fund an unsupported cause.

> *By utilizing petitioners' funds* for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Maynard*, 430 U.S. at 715, 51 L.Ed.2d 752, 97 S.Ct. 1428. The First Amendment protects the individual's right of participation in these spheres from precisely *this type* of invasion.

Lehnert, 114 L.Ed.2d at 591 (emphasis added). *See also Cahill v. Public Service Commission*, 76 N.Y.2d 102, 111-12, 556 N.Y.S.2d 840, 843-44, 556 N.E.2d 133 (N.Y. 1990). Moreover, in *Lehnert*, the Court rejected appellees' position when advocated by Justice Marshall, who argued in dissent that merely funding union activities did not "conscript[ ]" dissenters' "expressive capacities." *Id.* at

---

8 *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Widmar v. Vincent*, 454 U.S. 263 (1981), also stressed by appellees, are not to the contrary because they are not compelled speech cases. They hold only that, having once opened up physical space for public or campus use and advocacy—a shopping center in *Pruneyard* and classrooms in *Widmar*—the space's owner cannot then selectively restrict access. The critical distinction is that appellants have not voluntarily made their pocketbooks publicly accessible for the use of all others besides NYPIRG. Only the very regulation they challenge does that.

604 (Marshall, J., concurring in part and dissenting in part). The fact that appellants' student activity fee will also compel them to speak through a number of other campus groups in addition to NYPIRG in no way heals the constitutional infirmity; it simply means that students must fund more than one unwanted view. *See Galda II*, 772 F.2d at 1067 ("[f]or example, if the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded"). And since "the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect," *Lehnert*, 114 L.Ed.2d at 591, it is not dispositive that others receive appellants' funds along with NYPIRG. Appellants may agree with their speech and many recipients, being athletic, social and service groups, do not speak at all.

In short, appellants' right to be free from compelled speech suffers when NYPIRG uses student funds to raise issues on campus, organize the community and lobby the legislature in pursuit of "economic and social justice." Likewise their right to associate or not with whom they please is compromised by NYPIRG's automatic membership policy. These intrusions must be justified by the state.

II. *SUNY Albany's Interest in Funding NYPIRG from the Student Activity Fee and in NYPIRG's Automatic Membership*

Having set forth appellants' interest in averting compulsory speech and association, we must now consider the university's interest in funding NYPIRG from the student activity fee, and by extension allowing NYPIRG to make members of all who pay it. The regulation by which

NYPIRG and other groups receive a share of the fee is not intended to restrict free speech. On the contrary, it seeks to expand campus speech by facilitating the activities of a wide variety of speakers. And the funding provision is also content-neutral; that is, it does not grant or withhold funds based on the content of the recipient's speech. We therefore look to see whether the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989); *Schad v. Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981) ("[e]ven where a challenged regulation restricts freedom of expression only incidentally . . . [it] must be narrowly drawn to avoid unnecessary intrusion on freedom of expression"); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also* Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 Harv. L. Rev. 1904, 1905-1906 (1989).

It is also important to note that, in scrutinizing the substantiality of SUNY Albany's interest in funding NYPIRG with student activity fees and permitting the membership policy, we accord wide latitude to universities to define and carry out their own educational missions. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). Of course, "state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy v. James*, 408 U.S. 169, 180 (1972), but academic freedom is itself a concern of that amendment, and it would not long survive in any meaningful way if courts were to take upon the task of micromanaging the everyday affairs of our nation's colleges. *Id.* at 180-181; *Ewing*, 474 U.S. at 226; *Bakke*, 438 U.S. at

312-313; *Keyisian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 602-603 (1967).

A. *Funding*

SUNY Albany's reasons for allotting a portion of the student activity fee to NYPIRG can be distilled to three distinct interests: 1) the general promotion of extracurricular activities, 2) the facilitation of what the district court called "participatory civics training," *Carroll*, 768 F.Supp at 1033, and 3) the stimulation of robust campus debate on a variety of public issues.

First SUNY's regulation seeks to foster a rich extracurricular life for students at Albany and other campuses. A former chancellor of SUNY Albany put it this way:

> The experience of a student on any campus extends beyond a classroom experience. The basic philosophy of an educational experience in any institution that I am familiar with is to provide for a student as wide a range of opportunities and exposures which will allow for the development of the potentials of an entire individual . . . I would stress the importance of [students] reaching out during their undergraduate years to sample, to explore, to see various kinds of activities, because it is one of the rare times in an individual's life when you have an opportunity to learn a great deal more about different kinds of activities and events.

The value to students of participating in a range of extracurricular activities is not limited to the things they do and learn. It also involves the people they encounter in the process. As a president of Princeton University once wrote, "[a] great deal of learning occurs informally. It occurs through interactions among students . . . who

have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences." *Bakke*, 438 U.S. at 312-13 n. 48.

Inherent in SUNY's regulation, then, is a particular and of course quite common vision of the university as more than the sum of classes in its course catalog—as a sort of sanctuary where young adults grow in a myriad of ways. *See Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring) (university "atmosphere" includes extracurricular activities, "critical aspect[s] of campus life"). As was said of the use of a similar activity fee at the University of Nebraska, "[w]ithin wide limitations a state is free to adopt such educational philosophy as it chooses. The Board of Regents of the University of Nebraska obviously has embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom." *Veed v. Schwartzkopf*, 353 F.Supp. 149, 152 (D. Neb. 1973) (holding constitutional the granting of student activity funds to the campus newspaper), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). It is in service of a similar "philosophy" of education that SUNY Albany has established a scheme whereby a multitude of political, educational, social and recreational organizations receives funds from each student's payment of the student activity fee upon registration. The $3.00 allocation to NYPIRG is part of this scheme and, to the administration of SUNY Albany, is consistent with the university's desire to enrich the overall extracurricular lives of students.

The second interest SUNY Albany aims to serve by funding NYPIRG with student activity fees is more strictly educational. NYPIRG, the university believes, teaches specific, concrete skills—research, speaking, writing, organization and advocacy—to those who join it.

"Participating students in each area learn about their chosen project; prepare reports, memoranda and press releases; practice public survey techniques; involve themselves in community service efforts; obtain experience in public speaking; sponsor debates; and communicate with their legislative representatives." *Carroll*, 768 F.Supp. at 1032. NYPIRG also instills in students a sense of civic activism and responsibility. By learning about the political process, putting information before the public via research, speakers and debates, and working to change minds and raise consciousness, students enjoy what SUNY Albany President Vincent O'Leary called "an opportunity of participating, it would seem to me, in the most fundamental aspects of a democratic society." Or, as Judge Owen put it at trial, NYPIRG administers "a hands-on civics exercise." SUNY Albany has already demonstrated its interest in teaching students these skills by offering courses in research, writing and government; it may also seek to further that interest by allocating student activity fee money to organizations like NYPIRG that accomplish substantially the same things.

The final, and in our view most important, interest that SUNY Albany tries to advance by funding NYPIRG and other groups with shares of the activity fee is to stimulate uninhibited and vigorous discussion on matters of campus and public concern. At trial, President O'Leary testified that, by funding a wide variety of campus interest groups like NYPIRG, the activity fee "create[s] a forum for the expression of diverse views at Albany." Such a forum, he continued, is "consonant with the educational mission" of the university. In seeking to foster debate, exchange and contemplation about matters of campus and wider importance, SUNY Albany is hardly assuming a novel collegiate role. As Justice Brennan wrote in *Keyishian*, "[t]he

classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945)). Indeed, SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). This constitutional interest is no less forceful or applicable on campus than it is in the community at large. *Ewing*, 474 U.S. at 226 n.12 (academic freedom, "a special concern of the First Amendment," thrives on "the independent and uninhibited exchange of ideas"); *Healy*, 408 U.S. at 180-181. A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place.

Just as SUNY Albany is not unique in defining its role to include the nurturing of campus debate, neither is it unique in using a student activity fee as the means to that end. Other colleges do likewise. Of the allocation of student activity fees to several campus groups at a college of Rutgers, the State University of New Jersey, the Third Circuit commented that:

> This fee, a lump sum used to subsidize a variety of student groups, can be perceived broadly as providing a "forum" for a diverse range of opinion . . . Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of diverse views.

Galda v. Bloustein, 686 F.2d 159, 166 (3rd Cir. 1982) ("*Galda I*"); *Widmar*, 454 U.S. at 267-268 n.5 (1981) ("campus of a public university, at least for its students, possesses many of the characteristics of a public forum"); *Galda II*, 772 F.2d at 1064; *Kania v. Fordham*, 702 F.2d 475, 477 (4th Cir. 1983); *Veed*, 353 F.Supp. at 153.

We conclude that these three interests—the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate—together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG. We also believe that these interests would be served less effectively absent the activity fee distribution regulation. *Albertini*, 472 U.S. at 689.

Clearly, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities. Of equal importance is the stability and predictability the fee scheme provides; established organizations like NYPIRG that receive repeated Student Association backing can estimate their yearly funding with some accuracy and expect a steady annual flow of money. Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view.

While we agree with appellees that activity fee funding of NYPIRG furthers substantial SUNY Albany interests, we nevertheless agree with appellants that they cannot be charged for all NYPIRG expenditures. Taking SUNY Albany students' money and using it, as NYPIRG does, off Albany's campus—to, *e.g.*, pay non-student lobbyists, cover statewide administrative costs, finance other SUNY chapters—stretches the nexus between the extracted fee and SUNY Albany's educational interests too far, beyond what is constitutionally permissible. By allowing student money to finance NYPIRG at all we have already sanctioned a considerable infringement of appellants' freedom from compelled speech. *See Ellis*, 466 U.S. at 455 ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"). Moreover, we are mindful of our duty to ensure that even incidental burdens on speech be "narrowly drawn." *Schad*, 452 U.S. at 69 n.7. Hence we are unwilling to go farther than necessary to fulfill SUNY Albany's substantial interests, and do not believe that these con-

cerns can justify NYPIRG's off campus expenditures. Students opposed to NYPIRG can be made to tolerate some compromise of their First Amendment rights when the benefits of a varied extracurricular life, hands-on civics training, and robust campus debate are all around them to approvingly take part in, actively oppose, or merely witness dispassionately firsthand. *See Lehnert*, 114 L.Ed.2d at 590-591 (infringement of nonunion workers' First Amendment rights acceptable when they benefit from union's representation and would otherwise be "free riders;" rationale lost when union acts "outside the limited context of contract ratification or implementation"); *Keller*, 110 L.Ed.2d at 13. These benefits vanish when NYPIRG money is spent in the halls of the state legislature or at the main offices in New York City. SUNY Albany's interests, however substantial, are still, after all, those of the university and its community, not that of an independent statewide organization.

In an attempt to sever NYPIRG's constitutional expenditures from its unconstitutional ones, we could order the organization to segregate its accounts and trace activity fees through the group's funding pipeline—from award by the Student Association through NYPIRG's bank accounts and back to specific campus activities—to make certain no dissenting student paid for an off campus program. Or we could carefully scrutinize each NYPIRG project to see whether it is chiefly "off campus" or "on campus," and thus eligible or ineligible for activity fee funding. But, given our unwillingness to micromanage the affairs of universities and their student organizations, we are reluctant to immerse ourselves to this degree in NYPIRG's inner workings. Instead, we think it sufficient to require that NYPIRG spend as much money on activities at SUNY Albany as it takes in from SUNY Albany students

via their activity fees. For example, NYPIRG received $57,600 from Albany students' fees during the 1989-1990 academic year; if it again receives that amount from the Albany Student Association for the 1992-1993 academic year, it must put that figure from its general fund back into projects or expenses at SUNY Albany. This will ensure that, in effect, objecting students like appellants contribute only to NYPIRG programs at SUNY Albany, and not to off campus expenditures on such things as lobbying, staff salaries and administrative costs. We remand, therefore, and order the district court to fashion, as unintrusively as possible, procedures requiring NYPIRG to confirm in the Albany Student Association budgetary process that it spends at SUNY Albany the equivalent of Albany students' activity fee contribution.[9]

B. *Membership*

The interests that legitimize SUNY Albany's distribution of students' money to NYPIRG and a host of other organizations do not come close to being sufficiently substantial to justify NYPIRG's automatic membership policy. Once the activity fee has been used to set in place a campus where extracurricular options abound and ideological and other debate is vigorous, students need not be further linked against their will or knowledge with any student organization. Far from fulfilling SUNY Albany's

---

9 We note that NYPIRG has already, in the past, submitted reports to the SUNY Albany administration detailing its various programs on campus. These reports were completed in response to requests from the administration, which sought to confirm that NYPIRG was spending activity fees "for the support of programs for the benefit of the campus community," as the regulation requires. Perhaps these reports can be submitted annually, if they are not already, and include specific evidence that NYPIRG spends as much on campus as it takes in from the activity fee.

interests in promoting campus pluralism and free choice among several avenues of informal learning, allowing one group to make members of all students gives it an unearned advantage in the campus competition for hearts and minds. More important, it puts the lie to appellees' argument that students are not linked in the popular mind with NYPIRG aims. NYPIRG expressly forges such a link when it proclaims that its "membership" includes all fee paying SUNY Albany students. By overtly and inaccurately claiming to represent the interests of the SUNY Albany student body, NYPIRG has irredeemably trangressed the proscription against forced association.

NYPIRG's membership provision raises similar concerns in this case as New Jersey PIRG's funding did in *Galda I* and *Galda II*. In those cases, NJPIRG was financed with a separate assessment, and was not simply an additional group taking from a larger activity fee as NYPIRG is here. "In that situation," wrote the Third Circuit, "a university's ability to insure a balance in access is infringed." *Galda II*, 772 F.2d at 1067. Here too, NYPIRG's membership provision amounts to special treatment that skews the university's otherwise neutral support of a variety of viewpoints. As automatic membership in NYPIRG serves no substantial SUNY Albany interest, the district court should order NYPIRG to redefine its membership to include only those students who consent to becoming members, and not simply every student who pays an activity fee.

CONCLUSION

The balance we have attempted to strike between the First Amendment's proscription of compelled speech and association and its concern for uninhibited advocacy and

academic freedom may disappoint those in search of decisional absolutes or neat line drawing. We believe it, however, to be a fair accounting of both SUNY Albany's substantial interests and appellants' right to be free of that compelled speech not narrowly in service of those interests. Accordingly, we affirm the allocation of activity fee money to NYPIRG, and reverse and remand with instructions that the district court ensure that NYPIRG spend as much at SUNY Albany as it receives from Albany students' fees, and eliminate NYPIRG's automatic membership scheme. Each party shall bear its own costs on this appeal.

APPENDIX B

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hole any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

APPENDIX C

8 N.Y.C.R.R. § 302.14
STATE UNIVERSITY OF NEW YORK
STUDENT ACTIVITY FEE REGULATION

***302.14** Student activity fees. (a) *Referendum.* Prior to the close of the academic year 1976-77 with sufficient time provided for the orderly budget planning of student activity programs, and every four years thereafter, the student body (or such components thereof as may be designated by the chief administrative officer, or his designee) at each State-operated campus shall determine by referendum whether student activity programs shall be supported by either voluntary or mandatory student fees. The implementation of the 1976-77 referendum determination shall become effective in relation to the appropriation, collection and disbursement of such fees for the 1977-78 academic year. The determination resulting from each referendum shall remain in force for a period of four academic years, except that at any time and from time to time within such four year period a

---

* Notwithstanding the requirements for a student activity fee referendum during the 1976-77 academic year, if the student body at a State-operated campus conducted a referendum during the 1975-76 academic year, pursuant to the provisions of section 302.14 of this Title, the determination of such referendum shall become effective for the 1976-77 academic year and shall thereafter remain in force until the close of the 1980-81 academic year, subject to the continuing authority delegated to the representative student organization at each campus to conduct such a referendum at any time in accordance with the student activity fee policy.

subsequent referendum held in accordance with the constitution and by-laws of the representative student organization or organizations may effect a change in this determination with respect to the following academic year and to continue for the remaining portion of the four-year period.

(b) *Voluntary fees.* Where students at a State-operated campus have determined to make the payment of student activity fees voluntary, the representative student organization shall be responsible for the collection, appropriation and disbursement of such fees. With the approval of the chief administrative officer, or his designee, personnel or facilities of the campus, or both, may be used in connection with the collection of such fees on behalf of the representative student organization provided that the collection of voluntary student activity fees is clearly distinguished from the collection of required university fees.

(c) *Mandatory fees.* Where students at a State-operated campus have determined to make the payment of student activity fees mandatory, the appropriation, collection and disbursement of such fees, whensoever collected, shall be governed by the following regulations:

(1) Preparation and certification of the budget. The representative student organization shall prepare and approve a budget governing expenditures from student activity fees in accordance with the constitution and by-laws of the student organization, and consistent with the principles of equal opportunity, prior to registration for each term. Allocations included in the budget shall fall

within programs defined in paragraph (3) of this subdivision. The approved budget shall thereafter be presented to the chief administrative officer prior to the registration for each term for his review and certification that the allocations are in compliance with the provisions of paragraph (3) of this subdivision. In the event that the chief administrative officer, or his designee, concludes that a particular proposed allocation may not be in compliance with the provisions of this Part, he shall refer such proposed allocation to a campus review board composed of eight members of whom four shall be appointed by the representative student organization and four appointed by the chief administrative officer, or his designee. The campus review board shall study the proposed allocation and make a recommendation with respect to it. The chief administrative officer, or his designee, shall thereafter make the final decision. Any proposed allocation which is determined not be [*sic*] in compliance with the provisions of these regulations shall be excluded from the budget. Upon determination by the chief administrative officer, or his designee, that the approved budget is in compliance with these regulations, he shall so certify, and such certification shall authorize the collection of the fee at registration.

(2) Collection at registration. Upon registration, every student shall be required to pay a fee, or proportionate part thereof for the term for which he registers, as may have been fixed and assessed by the representative student organization to the extent that such fee does not exceed an amount to be determined by the chancellor in consultation with the student assembly. Failure to pay the required fee may result in denial of registration. The

fiscal officer of each State-operated campus shall collect the prescribed fee at the time of registration and shall pay over the amounts so collected to a custodial and disbursing agent designated by the representative student organization and approved by the chief administrative officer, or his designee. If there is reasonable evidence in an individual case, as determined by the chief administrative officer, or his designee, that payment of the fee may cause undue hardship, such student may nevertheless be allowed to register and his obligation to pay such fee shall thereafter be subject to administrative review and action by the chief administrative officer, or his designee, after consultation with the representative student organization. In a case in which a student has been allowed to register without payment of the student activity fee, the chief administrative officer of the campus concerned may withhold grades or transcripts of credits until payment has been waived by such administrative action or the obligation has been met. In addition, the representative student organization may determine to deny participation in student activities in the case of any student who has not fulfilled his obligation with respect to payment of the mandatory student activity fee. Student imposed fees in excess of the mandated fee shall be considered voluntary within the provisions of subdivision (b) of this section. Policies governing refunds to students who cancel their registration or withdraw from the university shall be established by the representative student organization.

(3) Use of funds. Funds which are collected under provisions of this section which require every student to pay the prescribed mandatory fee shall be used only for

support of the following programs for the benefit of the campus community:

(i) programs of cultural and educational enrichment;

(ii) recreational and social activities;

(iii) tutorial programs;

(iv) athletic programs, both intramural and intercollegiate;

(v) student publications and other media;

(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature;

(vii) insurance related to conduct of these programs;

(viii) administration of these programs;

(ix) transportation in support of these programs;

(x) student services to supplement or add to those provided by the university; and

(xi) remuneration to student officers for service to student government.

(4) Disbursement of funds. Proceeds of the student activity fee shall be disbursed by the representative student organization, through the designated custodial and disbursing agent, provided that the fiscal commitment for each expenditure shall have been approved by the chief administrative officer, or his designee. In the event that the chief administrative officer, or his designee, concludes that a particular fiscal commitment may not be in

compliance with an approved budgetary allocation and the provisions of this section, he shall refer such proposed fiscal commitment to the campus review board for review and recommendation. Final determination for approval of the compliance with this section of any fiscal commitment shall rest with the chief administrative officer or his designee. Fiscal and accounting procedures prescribed by the chancellor, or his designee, shall be adopted and observed by the representative student organization. These procedures shall include, among other things, provisions for an annual audit.

(5) Changes to approved budget. Changes to the approved budget after certification, either prior to or subsequent to the collection of mandatory fees, shall be subject to administrative review and certification by the chief administrative officer, or his designee, in the same manner as was applicable to the original budget.

(d) *Use of college facilities.* The provisions of this section shall not be interpreted to authorize the use of college facilities for student activities and programs without appropriate administrative approval.